1980

Walter Wallis and Marleen Wallis v. H. E. Thomas et al : Brief of Respondents

Utah Supreme Court

Ronald C. Barker; Attorney for Appellants-Defendants;
Wayne G. Petty; Attorney for Respondents-Plaintiffs;

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WALLIS and MARLEEN WALLIS,

Plaintiffs - Respondents,

vs.

H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., and AMERICAN SAVINGS & LOAN ASSOCIATION,

Defendants - Appellants.

Case No. 17051

WALTER WALLIS and MARLEEN WALLIS,

Plaintiffs - Respondents,

vs.

H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., AMERICAN SAVINGS & LOAN ASSOCIATION, and GLEN JUSTICE MORTGAGE COMPANY, INC.,

Defendants - Appellants.

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS, WALTER WALLIS AND MARLEEN WALLIS

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE G. HAL TAYLOR, JUDGE

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STATUTES CITED

APPENDIX

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WALLIS and MARLEEN WALLIS, Plaintiffs - Respondents, vs. H. E. THOMAS, INTERNATIONAL EQUITIES, INC., NATIONAL FUND, INC., and AMERICAN SAVINGS & LOAN ASSOCIATION, Defendants - Appellants.	)	Case No. 17051
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BRIEF OF RESPONDENTS AND CROSS-APPELLANTS, WALTER WALLIS AND MARLEEN WALLIS

NATURE OF THE CASE

Plaintiffs-respondents initiated this action against defendants-appellants, alleging fraud and violation of the Utah

Uniform Land Sales Practices Act, Section 57-11-1 et seq., Utah Code Annotated.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Peter F. Leary on December 13, 1977. Judgment was entered in favor of plaintiffs on May 31, 1979 on the basis of fraud. On August 20, 1979 Judge Leary granted defendants a new trial.

A second trial was held before the Honorable G. Hal Taylor on March 5, 1980. Judgment was thereafter entered in favor of plaintiffs on their claims under the Utah Uniform Land Sales Practices Act.

RELIEF SOUGHT ON APPEAL

Respondents pray that the judgment of the District Court from the second trial be affirmed and that respondents be awarded their attorney's fee on this appeal.

In the alternative, and as a cross-appeal, respondents pray that the judgment of the District Court from the first trial be affirmed.

STATEMENT OF FACTS

In July, 1975, plaintiffs owned a home in Salt Lake County, Utah constructed on Lot 31, Montana Ranchos Subdivision, having a street address of 9327 Maison Drive. There were two mortgage loans on the property neither of which was then current. Plaintiffs were under the impression that the property was going to be sold because of the two mortgage delinquencies. Plaintiffs were attempting to sell the property and had listed it for sale (R. 557-58).

Plaintiffs responded to a newspaper advertisement placed by defendant International Equities, Inc., that it bought equities in homes, cash for equities (R. 558). After the home was first inspected by an employee of International Equities, Inc., defendant H. E. Thomas, president of defendant International Equities, Inc. met with Mrs. Wallis at the home (R. 559). Defendant Thomas met with plaintiffs at their home the following evening.

The facts as determined by the trial court at the second trial sufficiently, accurately and properly state the facts of this case:

1. Plaintiffs are residents of Salt Lake County, State of Utah.

2. At all pertinent times herein, defendant H. E. Thomas was a resident of Salt Lake County, State of Utah. Defendant International Equities, Inc. had a place of business in Salt Lake County, State of Utah, and H. E. Thomas was the president of said International Equities, Inc.

3. On or about the 8th day of July, 1975, plaintiffs and defendant International Equities, Inc. discussed, negotiated and thereafter entered into certain agreements (Exhibits 14-P and 2-P) whereby plaintiffs would convey their home and real property located 9327 Maison Drive, Sandy, Utah, in exchange for defendant International Equities, Inc. assuming a first and second mortgage on said real property, and defendant International Equities, Inc. also conveying to plaintiff 10 acres of land located in Iron

County, Utah, ("the Iron County property", more particularly described in paragraph 8(d)). On July 8, 1975, plaintiffs conveyed to International Equities, Inc. their home at 9327 Maison Drive, Sandy, Utah and International Equities, Inc. conveyed the Iron County property to plaintiffs.

4. In connection with the real property located in Iron County, Utah, which defendant International Equities, Inc. conveyed to plaintiffs, defendant H. E. Thomas individually and on behalf of International Equities, Inc. made certain representations concerning said real property. Said defendant, in the stated capacities, represented to plaintiffs that the real property was located within five minutes drive from Brian Head Ski Resort, that the property is contigious to agricultural property under cultivation, that the property is worth $15,000 ($1,500 per acre), that said property is within one mile of utilities, water and other services, and that a subdivision is being developed equivalent to the Bell Canyon Acres Development in Salt Lake County, that streets were in, and that white fencing was being placed on lots in the subdivision.

5. Each of the representations in the foregoing paragraph 4 involved a material fact concerning said real property and was false. The property is not located within 5 minutes drive from Brian Head Ski Resort. The property is not contigiuous to agricultural property under cultivation. The property is not worth $15,000 ($1,500 per acre).

The property is not within one mile of utilities, water and other services. Streets are not in and white fencing is not being placed on lots in the subdivision.

6. Defendant H. E. Thomas, individually and on behalf of International Equities, Inc., also delivered to plaintiffs a plat or subdivision map, Exhibit 5-P. Said defendant showed plaintiffs the location of the two lots plaintiffs were to receive, as well as the other lots in the subdivision, namely lots 1 through 192. Defendants showed plaintiffs the location of the lots plantiffs were to receive on Cedar Avenue. Defendant described lots 10-15, 34-39, 154-159, and 178-183 as being reserved for commercial purposes.

7. International Equities, Inc. acquired 300 acres of property in Section 7, Township 33 South, Range 14 West, Salt Lake Base and Meridian, Iron County, Utah in 1973.

8. Defendant International Equities, Inc. made the following conveyances of portions of the 300 acres referred to in the previous paragraph:

(a) Warranty Deed to Terro Corp., April 23, 1975, recorded April 29, 1975, in Book 206, page 65.

(b) Warranty Deed to Jon McGowan and Associates, January 31, 1975, recorded in Book 205, page 90.

(c) Warranty Deed to National Fund, Inc. dated April 17, 1975, recorded April 29, 1975, in Book 206, page 66.

(d) Warranty Deed to Walter Thomas Wallis and Marleen Kay Wallis, dated July 8, 1975, recorded July 23, 1975 in

Book 209, page 99: Northeast 1/4 of Southwest 1/4 of Southwest 1/4 of Section 7, Township 33 South, Range 14 West, Salt Lake Base and Meridian, excepting therefrom all oil and mineral rights from said land as previously reserved and/or conveyed.

9. H. E. Thomas directly controlled International Equities, Inc. at all material times herein, and said H. E. Thomas materially aided in the disposition of the Iron County property to the plaintiffs.

10. The property referred to in paragraph 7 and owned by International Equities, Inc., and shown to plaintiffs as a subdivision of 192 lots, was proposed by International Equities, Inc. to be divided for the purposes of disposition into ten or more units.

11. Defendants did not register the subdivided lands pursuant to the Utah Uniform Land Sales Practices Act, 57-11-1 et seq. Defendants did not deliver a current public offering statement to plaintiffs. Plaintiffs did not give defendants a receipt for a public offering statement.

12. Defendants H. E. Thomas and International Equities, Inc. both participated in, promoted and received the benefits resulting from the misrepresentations made to plaintiffs.

13. The consideration paid by plaintiffs for the subdivided lands was the value of their home on July 8, 1975, $66,495.88, less the amount of the mortgages assumed by the defendant International Equities, Inc. of

$51,495.88. Such difference is the amount of $15,000 and is the amount of plaintiffs' damage, for which defendants are jointly and severally liable. Plaintiffs paid no property taxes on the Iron County property. Plaintiffs received no income from the Iron County property.

14. Plaintiffs have incurred a reasonable attorney's fee in the sum of $5,000.

15. Plaintiffs made tender of reconveyance by appropriate instrument prior to entry of judgment.

16. Plaintiffs waived their claims with respect to their Third Cause of Action. In view of the Court's findings regarding the First Cause of Action, the Court makes no findings regarding plaintiffs' Second Cause of Action.

The record clearly and adequately supports the foregoing Findings of Fact. The defendant's Iron County property was proposed by defendants to be a subdivision and was so represented to plaintiffs (R. 562, 567, 570-571, 613, 644, 689, 690, 693, 698).

Defendants suggest that misrepresentations made by defendant Thomas are unimportant because the controlling issue is whether the Iron County property conveyed by defendants to plaintiffs were "subdivided lands" or "subdivision" within the meaning of the Utah Uniform Land Sale Practices Act. Defendants acknowledge that the Iron County property was not registered and that no public offering statement was given to plaintiffs (Appellant's Brief, pp. 4 and 5). Therefore, plaintiffs make no references in this brief to support other Findings of

the District Court in responding to Appellants' Brief. Further, the statements contained in points 3, 4, 5, 6, and 7 of Appellants' Statement of Facts are irrelevant.

The District Court made Conclusions of of Law supported by the foregoing Facts and the evidence in the case:

1. The property referred to in Finding number 7, a portion of which was conveyed by defendants to plaintiffs, is a "subdivision" or "subdivided land" within the meaning of Section 57-11-2(6), Utah Code Ann. 1953, as amended.

2. The offer of defendant International Equities, Inc. of the real property located in Iron County, Utah, and the conveyance by said defendants of said real property is in violation of Section 57-11-5, Utah Code Ann. 1953, as amended.

3. Defendants made untrue statements of material facts in disposing of the subdivided lands to plaintiffs, in violation of Section 57-11-17(1)(b), Utah Code Ann., as amended.

4. Defendant H. E. Thomas effected the transactions referred to herein on behalf of International Equities, Inc. and otherwise materially aided in the disposition of the subdivided lands to plaintiffs.

5. In accordance with the provisions of the Land Sales Practices Act, plaintiffs are entitled to recover from defendants the difference between the mortgages assumed by defendant International Equities, Inc., $51,495.88, and the value of their home located at 9327 Maison Drive,

Sandy, Utah, $66,495.88, or $15,000, together with interest at the rate of seven percent per annum from July 8, 1975, to the date of judgment, which amount is $4,947.95 to March 24, 1980, and $2.88 per day thereafter to the date of entry of judgment, and reasonable attorney's fees in the amount of $5,000.

6. Defendant International Equities, Inc. is entitled to recover the Iron County property, subject to real estate taxes and other assessments which may have been assessed against the Iron County property since July 8, 1975.

7. Plaintiffs are entitled to their costs herein.

8. Plaintiffs' Third Cause of Action should be dismissed with prejudice. Plaintiffs' Second Cause of Action should be dismissed without prejudice.

In connection with the first trial of this matter, following entry of judgment in favor of plaintiffs, defendants moved for a new trial on June 2, 1979. After hearing on the motion was held on July 9, 1979, plaintiffs filed a Motion to Amend and Enter Judgment (R. 179-80), dated August 9, 1980. An order granting a new trial was entered on August 20, 1979. Plaintiffs filed a Petition for Interlocutory Appeal, No. 16682, which Petition was denied. A copy of the Motion for a New Trial (R. 171-3), the Motion to Amend and Enter Judgment (R. 179-80) and the Order Granting a New Trial (R. 184-5) are attached hereto in the Appendix as Exhibits A, B, and C, respectively.

Plaintiff's cross-appeal from the Court's Order Granting a New Trial for the following reasons:

1. Defendant's motion for a new trial and the affidavit which formed a part thereof did not raise any of the grounds required by Rule 59(a) of the Utah Rules of Civil Procedure.

2. The Court's order granting a new trial did not refer to or come within any of the grounds identified in Rule 59(a) of the Utah Rules of Civil Procedure.

3. There was no properly identified basis for a new trial and the order granting a new trial was therefore erronous as a matter of law.

4. The Court abused its discretion in granting the motion for a new trial.

5. There was no showing of evidence either in the motion or the order granting a new trial from which it would appear there was at least a reasonable likelihood that a new trial would affect the result.

6. The punitive damages awarded by the trial Court were proper and did not constitute reversable error.

ARGUMENT

POINT I. DEFENDANTS CONVEYED TO PLAINTIFFS AN INTEREST IN SUBDIVIDED LANDS LOCATED IN THE STATE OF UTAH, IN VIOLATION OF THE UTAH UNIFORM LAND SALES PRACTICES ACT.

The Utah Land Sales Practices Act ("Act"), Section 57-11-1, et seq. Utah Code Annotated, as amended (U.C.A.) defines "subdivision" and "subdivided lands" as "any land which

is divided or is proposed to be divided for the purpose of disposition into ten or more units . . ." Section 57-11-2(6) U.C.A.

Section 57-11-5 of the Act provides that unless the subdivided lands are otherwise exempt:

> (1) No person shall offer or dispose of any interest in subdivided lands located in this state . . . prior to the time the subdivided lands are registered in accordance with this Act;
>
> (2) No person may dispose of any interest in subdivided lands unless an effective current public offering statement is delivered to the purchaser and the purchaser is afforded a reasonable opportunity, not to be less than 48 hours, to examine the public offering statement prior to his signing the contract or agreement of disposition. . .; and
>
> (3) No person shall dispose of any interest in subdivided lands without first requiring a dated, signed receipt for the public offering statement in a form to be approved by the division, from each purchaser . . .

The issue presented by defendants' appeal is whether the Iron County property conveyed to plaintiffs was an interest in "subdivided lands" or a "subdivision" as defined in the Act.

The rules of appellate review require this Court to review the evidence in the light most favorable to the successful party at the trial court. Carnasecca v. Carnasecca, 572 P.2d 708 (Utah 1977). The reviewing court must sustain the trial court even if the reviewing court might have come to a different decision had it been trying the matter. Wash-A-Matic, Inc. v. Rupp, 532 P.2d 682 (Utah 1975), Charlton v. Hackett, 11 U.2d 389, 360 P.2d 176 (1961). Where the trial court's findings and judgment are based on substantial, competent, admissible evidence, the Supreme Court will not disturb

such findings. Fisher v. Taylor, 572 P.2d 393 (Utah 1977). Furthermore, the Supreme Court is constrained to look at the whole of the evidence in the light favorable to the trial court's findings, including any fair inferences to be drawn from the evidence in all of the circumstances shown; the trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary. Hanover Ltd v. Fields, 568 P.2d 751 (Utah 1977), Howarth v. Osergaard, 30 U.2d 183, 515 P.2d 442 (1973), DelPorto v. Nicholo, 27 U.2d 286, 495 P.2d 811 (1972).

The trial court found that the defendants delivered to plaintiffs a plat or subdivision map, Exhibit 5-P (a copy of which is attached in the Appendix as Exhibit D), which was represented by defendants to show the property conveyed to plaintiffs and concerning which property and subdivision map defendants made certain representations. The defendants represented that streets and lots were located as shown on the subdivision map. The defendants showed plaintiffs the location of the two lots plaintiffs were to receive as well as the other lots in the subdivision, namely lots 1 through 192. The defendants showed the plaintiffs the location of the lots plaintiffs were to receive on Cedar Avenue and the defendants described lots 10-15, 34-39, 154-159 and 178-183 as being reserved for commercial purposes (Finding of Fact No. 6, R. 229). The trial court found that the property owned by International Equities, Inc. in Iron County from which plaintiffs were to receive ten acres, was shown to plaintiffs as a subdivision of 192 lots and was

proposed by International Equities, Inc. to be divided for the purpose of disposition into ten or more units. The trial court found that the defendants did not register the subdivided lands pursuant to the Utah Uniform Land Sales Practices Act, that defendants did not deliver a current public offering statement to plaintiffs, and that plaintiffs did not give defendants a receipt for a public offering statement. The trial court found that defendants H. E. Thomas and International Equities, Inc. both participated in and received the benefits resulting from the misrepresentations made to plaintiffs. The trial court found that the value of the consideration given to defendants by plaintiffs was the sum of $15,000.

All of the Court's findings are supported by admissible, competent evidence. The record clearly establishes that the defendants told plaintiffs the property they were to receive was located in a subdivision consisting of 192 lots. This representation, which the Court believed and accepted as being true, was relied upon by the plaintiffs in deciding to accept the agreement with the defendants. Defendants delivered a subdivision map to plaintiffs showing 192 lots and indicating that certain of the lots were being reserved for commercial purposes, and inferring, if not stating, that the balance of the lots was being offered for sale, exchange or other disposition. This evidence, and the trial court's findings and conclusions based thereon, must stand, even though the record contains conflicting testimony on the part of the defendants. It is within the province of the trial court to find the facts in

the face of conflicting evidence. McCarren v. Merrill, 15 U.2d 179, 389 P.2d 732 (1964), where the Supreme Court stated:

> The resolution of the dispute in this case is governed by the old and oft repeated rule that where the evidence is in conflict, it is the trial court's prerogative to believe that which he finds more convincing, in that his findings will not be disturbed on appeal so long as there is some substantial evidence to support them. See Malstrom v. Consolidated Theaters, 4 U.2d 181, 290 P.2d 689.

Contrary to the assertion of appellants, the Act does not require the disposition of ten units. "Subdivision" and "subdivided lands" include any land divided or proposed to be divided for the purpose of disposition into ten or more units. The record abundantly reflects the defendants' representations that there was a subdivision upon which there were to be certain improvements. The defendants delivered a map to plaintiffs showing the subdivision and layout of lots or units. Further, defendants made four conveyances of portions of the subdivision within a six-month period. All of this evidence is more than sufficient to sustain the trial court's Findings and Conclusions, notwithstanding defendants' assertion that the proposal to subdivide had been abandoned.

Defendants rely on certain exemptions in the Act. The reliance is unfounded.

The definitions of "disposition" and "offer" in the Act refer to transactions or solicitations, "if undertaken for gain or profit." At least two of the conveyances made by International Equities, Inc. were for gain or profit. Interna-

tional Equities, Inc. claims that the other two were not for gain or profit, having been transactions with related companies.

Appellants rely on the exemption of Section 57-11-4(1)(a). That exemption provides that the Act does not apply to offers or dispositions of an interest in land "by a purchaser of subdivided lands for his own account in a single or isolated transaction." That exemption contemplates a purchaser of subdivided lands making a subsequent sale for his own account in a single or isolated transaction. In this case, that exemption would apply if the Wallises were making an offer or disposition of an interest in subdivided land for their own account, in a single or isolated transaction. It does not apply to the subdivider or promoter of subdivided lands.

Appellants rely upon the exemption provided in Section 57-11-4(1)(c). The Act does not apply to offers or dispositions of an interest in land "to any person who acquires that interest for use in the business of constructing residential, commercial or industrial buildings; or to any person who acquires that type of land for the purpose of disposition to a person engaged in such business . . ." Appellants mischaracterize the evidence regarding plaintiffs' intentions for constructing buildings upon the property. Plaintiffs discussed between themselves that someday they might build homes upon the property (R. 625), although plaintiffs had made no decision or commitment regarding construction of homes on the property (R. 841). In addition, plaintiffs are not in the business of constructing residential, commercial or industrial buildings, al-

though Mr. Wallis has been employed by a company in the business of making improvements upon existing buildings. It is clear that the property was not received by the Wallises solely for the purpose of constructing buildings thereon for resale.

Finally, appellants rely on the exemption of Section 57-11-4(2)(e). That section provides that the Act does not apply to "offers or dispositions of any interest in oil, gas, or other minerals or other royalty interests therein if the offers or dispositions of those interests are regulated as securities by United States or by the securities commission of this state." (Emphasis added.) There was no evidence or testimony before the Court that the oil, gas or mineral interests conveyed by International Equities, Inc. are regulated as securities by the United States or by the securities commission of Utah, and if so regulated, the exemption suggests that such regulation must be pursuant to registration with the federal or state securities commission. There is no evidence before the Court either that those interests are regulated or, if regulated, that International Equities, Inc. had registered the interests or were exempt from such registration.

In conclusion, the exemptions cited by appellants are inapplicable.

The evidence, and the trial court's Findings and Conclusion, require the affirming of the judgment against appellants.

POINT II. THE COURT'S FINDINGS, AND THE EVIDENCE IN THE CASE, ARE SUFFICIENT FINDINGS OF FRAUD AGAINST THE DEFENDANTS.

The trial court was concerned with a possible double recovery in the event it awarded judgment for plaintiffs on their second cause of action. At the conclusion of the plaintiffs' case, appellants made a motion to dismiss and asked the Court to require plaintiffs to elect its remedies under the fraud or Utah Uniform Land Sales Practices Act. Plaintiffs cited to the Court the case of Lamb v. Bangart, 525 P.2d 602 (Utah 1974), which plaintiffs read as standing for the proposition that where a statute provides remedies and specifically provides that such remedies are in addition to other available remedies, judgment may be entered and damages assessed as to both (remedies under the statute and the other available remedies). The discussion among the Court and counsel regarding this issue is contained in pages 745-8 of the record, and set forth as Exhibit E to the Appendix for the Court's convenience.

While plaintiffs do not argue the point that the parties ought not to be permitted to litigate the same issue more than once, the Court's Findings and Conclusions sufficiently support a finding in fraud. The Court did not enter specifically findings of fraud as to the second cause of action so that plaintiffs could not obtain a double recovery. Plaintiffs have never and do not now seek a double recovery, but only what they are entitled to under their fraud cause of action or the Utah Uniform Land Sales Practices Act. Appellants would attempt to have this Court reverse the trial court's decision on the Land

Sales Practices Act, reverse the trial court and hold that the plaintiffs' claims of fraud are dismissed with prejudice, and leave plaintiffs with nothing after having proved their case as to both causes of action. If for any reason the award under the Land Sales Practices Act is reversed, judgment should be entered for plaintiffs on the basis of fraud.

POINT III. PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEY'S FEES ON APPEAL.

Section 57-11-17(2) of the Act provides in pertinent part as follows:

> In addition to any other remedies, the purchaser, under subsection (1) may recover the consideration paid for the unit together with interest at the rate of seven percent per year from the date of payment, property taxes paid, costs, and reasonable attorney's fees, . . .

Until recently, the rule of this Court was that attorney's fees on appeal are discretionary with the Court. Swain v. Salt Lake Real Estate & Investment Co., 3 U.2d 121, 279 P.2d 709 (1955); see also Bates v. Bates, 560 P.2d 706 (1977). In the recent case of Management Services Corp. v. Development Associates, No. 16341, filed September 11, 1980, this Court adopted the rule of law that "a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract . . . ." Plaintiffs submit that the Management Services Corp. case impliedly applies to a statutory provision authorizing the award of attorney's fees incurred in enforcing the statute to also include those attorney's fees incurred on appeal. Drawing upon the

language of Zambruk v. Perlnutter Third General Builders, Inc., 510 P.2d 472 (Colo.App. 1973), cited by this Court in Management Services Corp., the prevailing party awarded attorney's fees pursuant to enforcement of a statutory provision should be enabled to recover the full amount authorized by the statute, including fees incurred on appeal, so as not to diminish the amounts authorized by the statutory remedy. This policy is stated in the case of Stafford v. Carmann, 577 P.2d 836 (Kan. App. 1978):

> The final point on appeal involves the plaintiff's cross-appeal requesting that additional attorney's fees be allowed for the appeal. While K.S.A. 60-2006 does not expressly authorize the award of fees for an appeal, inherent in its meaning is the concept that attorney's fees should be awarded for all services rendered for the benefit of the one who proceeds under the provisions of the section. Furthermore, the allowance of attorney's fees for an appeal effectuates the policy behind the statute, . . .

Plaintiff's request that this Court adopt the rule of Management Services Corp. and apply it to statutes which authorize recovery of attorney's fees to include attorney's fees on appeal. The case should be remanded to the trial court for determination of the amount of attorney's fees to be awarded plaintiffs on this appeal.

POINT IV. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL AFTER THE FIRST TRIAL OF THIS MATTER.

After the first trial, the court granted a new trial on the basis that "the court committed reversable error [sic] particularly as it relates to the awarding of attorney's fees." After the first trial, the court issued a Memorandum Decision granting judgment to plaintiffs on their second cause

of action in the sum of $15,000 plus $3,750 for attorney's fees. Thereafter, judgment was entered in favor of plaintiffs in the sum of $15,000 actual damages and $3,750 punitive damages. Defendants requested a new trial, primarily on the basis that the Memorandum Decision had awarded attorney's fees which are not authorized in a fraud action, rather than punitive damages. In response, plaintiffs filed a motion to amend and enter judgment which provided in pertinent part as follows:

> Defendant's motion for a new trial and the Court's Memorandum Order of August 6, 1979, addressed the issue of an award of attorney's fees for punitive damages. If the Court determines that the punitive damages awarded are improper or excessive, the Findings of Fact, Conclusions of Law and Judgment should be modified accordingly. If necessary, consistent with the provisions of Rule 59(a), the court should open the judgment, take additional testimony, amend findings of fact and conclusions of law, and direct the entry of a new judgment.
>
> Upon amendment of the Findings of Fact, Conclusions of Law and Judgment, consistent with the Court's order regarding attorney's fees or punitive damages, any defects related thereto would be cured. Rule 61 provides that "the Court at every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."
>
> The parties have had their day in court and are entitled to entry of a judgment which is consistent with the evidence presented at said trial. Substantial justice may be achieved by amending the Findings of Fact, Conclusions of Law and Judgment in accordance with the Court's order. Substantial prejudice, delay and expense will result if a new trial is required. (R. 179-80)

While the granting or refusing of a motion for a new trial is a discretionary matter with the trial court, where the case is tried to the court and an error may be cured by the court by modifying Findings of Fact, Conclusions of Law and Judgment, it

is an abuse of discretion not to so amend and to enter the order granting a new trial. See Rules 59(a) and 61.

Where the parties have had an opportunity to fully and completely present their cases to the court, and where the judgment is in accordance with the evidence produced, it is an abuse of discretion to grant a new trial. See Uptown Appliance and Radio Co. v. Flint, 249 P.2d 826 (Utah 1952).

Defendants' motion for a new trial, including the affidavit which formed a part thereof, did not raise any of the grounds required by Rule 59(a) of the Utah Rules of Civil Procedure, although it referred to Subdivisions (1), (5), (6) and (7). The trial court has no discretion to grant a new trial absent showing one of the grounds specified in Rule 59. Tangero v. Marrero, 13 U.2d 290, 373 P.2d 390 (1962).

CONCLUSION

The judgment of the trial court should be affirmed and plaintiff allowed its attorney's fees on this appeal.

DATED this _____ day of November, 1980.

Respectfully submitted,

MOYLE & DRAPER

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Attorney for Plaintiff
600 Deseret Plaza
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the __ day of November, 1980 two true and correct copies of the foregoing Brief of Respondents were mailed, postage prepaid to the following:

Ronald C. Barker
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Salt Lake City, Utah 84115

Ronald C. Barker
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Telephone 486-9636

THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

---ooOoo---

WALTER WALLIS and MARLEEN WALLIS,

Plaintiffs,

vs.

H. E. THOMAS, et al.,

Defendants.

WALTER WALLIS and MARLEEN WALLIS,

Plaintiffs,

vs.

H. E. THOMAS, et al.,

Defendants.

MOTION FOR A NEW TRIAL

Civil No. 239555 & 233143

---ooOoo---

Come now the defendants H. E. Thomas and International Equities, Inc. and move the Court, pursuant to the provisions of Rule 59(a)(1), (5), (6) and (7), URCP, for a new trial in the above-entitled matter. The affidavit of H. E. Thomas in support of this motion is filed herewith. This motion is based in part upon the provisions of 78-7-25, UCA, 1953, Article I, §7 of the Constitution of the State of Utah, and similar provisions in the Federal Constitution.

Defendants allege that by reason of the long period of time which passed between the date of trial and the rendering of a decision by the Court, that he was deprived of his right to a fair trial and to due process.

Further, the findings, conclusions and judgment as entered in this matter are not consistent with the memorandum decision of the Court, the Court having awarded attorney fees under circumstances where the law does not permit the award of attorney fees, and counsel for plaintiffs having thereafter and without hearing presented findings and judgment purporting to convert said attorney fees into punitive damages. The judgment

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is contrary to and is not supported by the evidence or the law and should be vacated and set aside in the interests of justice.

Dated the 7 day of June, 1979.

Ronald C. Barker, attorney for defendants H. E. Thomas and International Equities, Inc., 2870 South State Street Salt Lake City, Utah 84115, telephone 486-9636

STATE OF UTAH)
: ss.
County of Salt Lake)

H. E. THOMAS, being first duly sworn, on his oath deposes and says that this affidavit is filed on behalf of himself and on behalf of the defendant International Equities, Inc.; that the following statements are true of his own knowledge except for statements made on information and belief and as to each of those statements he believes them to be true:

1. That this matter was tried to the Court setting without a jury on the 13th day of December, 1977.

2. That the Court took the matter under advisement at the conclusion of the trial, and thereafter on or about the _____ day of _____, 1979, by memorandum decision, awarded judgment in favor of plaintiffs and against these defendants on the second claim for relief in plaintiffs' complaint. Said memorandum decision, a copy of which is annexed hereto as exhibit "A", awarded attorney fees to plaintiffs. The claim under which said judgment was awarded is a tort claim and Affiant believes that the law does not allow the award of attorney fees in a tort claim.

3. Thereafter Affiant received from his attorney a copy of findings, conclusions and judgment prepared by counsel for plaintiff wherein the Court awards punitive damages in the same amount as had been specified in the memorandum decision as attorney fees, whereas the memorandum decision did not provide for punitive damages.

4. Affiant believes that after the long period of time which passed between the trial of this matter and the

Memorandum Decision by the Court, that the Court had forgotten a substantial part of the testimony and evidence adduced by the parties and accordingly that the defendants have been deprived of their right to a fair trial, to have the case decided on the basis of testimony and evidence adduced at the trial, and that the judgment deprives them of their property without due process of law.

5. Affiant believes that the plaintiffs failed to prove their claim against the defendants by a preponderance of the evidence, and that the proof was not made by clear and convincing proof as required in a fraud case.

Dated the 2 day of June, 1979.

H. E. Thomas

Subscribed and sworn to before me the 2nd day of June, 1979.

Notary Public residing at Salt Lake City, Utah

My commission expires: 12-26-80

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid, the _____ day of June, 1979, to Wayne G. Petty, attorney for plaintiffs, 600 Deseret Plaza, Salt Lake City, Utah 84111.

Ronald C. Barker

Wayne G. Petty, of
MOYLE & DRAPER
ATTORNEYS FOR Plaintiffs
600 DESERET PLAZA
NO. 15 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 521-0250

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

WALTER WALLIS and MARLEEN WALLIS, Plaintiffs, vs. H. E. THOMAS, et al., Defendants.	Civil No. 239555 MOTION TO AMEND AND ENTER JUDGMENT
WALTER WALLIS and MARLEEN WALLIS, Plaintiffs, vs. H. E. THOMAS, et al., Defendants.	Civil No. 233143

---oooOooo--

Plaintiffs Walter Wallis and Marleen Wallis move the Court, pursuant to the provisions of Rule 59 and Rule 61, Utah Rules of Civil Procedure, to amend and enter judgment in favor of plaintiffs based upon the Court's memorandum order of August 6, 1979.

Defendants' motion for a new trial and the Court's memorandum order of August 6, 1979, address the issue of an award of attorney's fees or punitive damages. If the Court determines that the punitive damages awarded are improper or excessive, the Findings of Fact, Conclusions of Law and Judgment should be modified accordingly. If necessary, consistent

with the provisions of Rule 59(a), the Court should open the judgment, take additional testimony, amend findings of fact and conclusions of law, and direct the entry of a new judgment.

Upon amendment of the Findings of Fact, Conclusions of Law and Judgment, consistent with the Court's order regarding attorney's fees or punitive damages, any defects related thereto would be cured. Rule 61 provides that "the Court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The parties have had their day in court and are entitled to entry of a judgment which is consistent with the evidence presented at said trial. Substantial justice may be achieved by amending the Findings of Fact, Conclusions of Law and Judgment in accordance with the Court's order. Substantial prejudice, delay and expense will result if a new trial is required.

DATED this 9th day of August, 1979.

MOYLE & DRAPER

By Wayne G. Petty
Wayne G. Petty
Attorneys for Plaintiffs

Mailed a copy of the foregoing Motion to Ronald C. Barker, attorney for defendants, 2870 South State Street, Salt Lake City, Utah, this 9th day of August, 1979.

Pauline M. Brown

Ronald C. Barker
Attorney for defendants
2870 South State Street
Salt Lake City, Utah 84115
Telephone: 486-9636

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooOoo---

WALTER WALLIS, et ux.,
Plaintiffs,
vs.
H.E. THOMAS, et al.,
Defendants.

Civil No. 239555

ORDER GRANTING NEW TRIAL

WALTER WALLIS, et ux.,
Plaintiffs,
vs.
H.E. THOMAS, et al.,
Defendants.

Civil No. 233143

---ooOoo---

Defendants' motion for a new trial in the above-entitled matters came on for a special hearing at the hour of 1:30 p.m. on the 9th day of July, 1979, before the Honorable Peter F. Leary, District Judge, with Wayne G. Petty appearing as counsel for plaintiffs and Ronald C. Barker appearing as counsel for defendants. Oral arguments were made by respective counsel and the matter was taken under advisement by the Court. It appearing to the Court that the Court committed reversable err particularly as it relates to the awarding of attorney fees, and good cause appearing therefor, it is hereby

ORDERED, as follows:

1. That defendants' motion for a new trial is hereby granted.

2. The judgement heretofore entered in this matter in favor of plaintiffs and against defendants is hereby vacated and set aside.

3. The Clerk's Office is directed to put this matter on the trial calandar for an expedited trial setting.

Dated the 20 day of August, 1979.

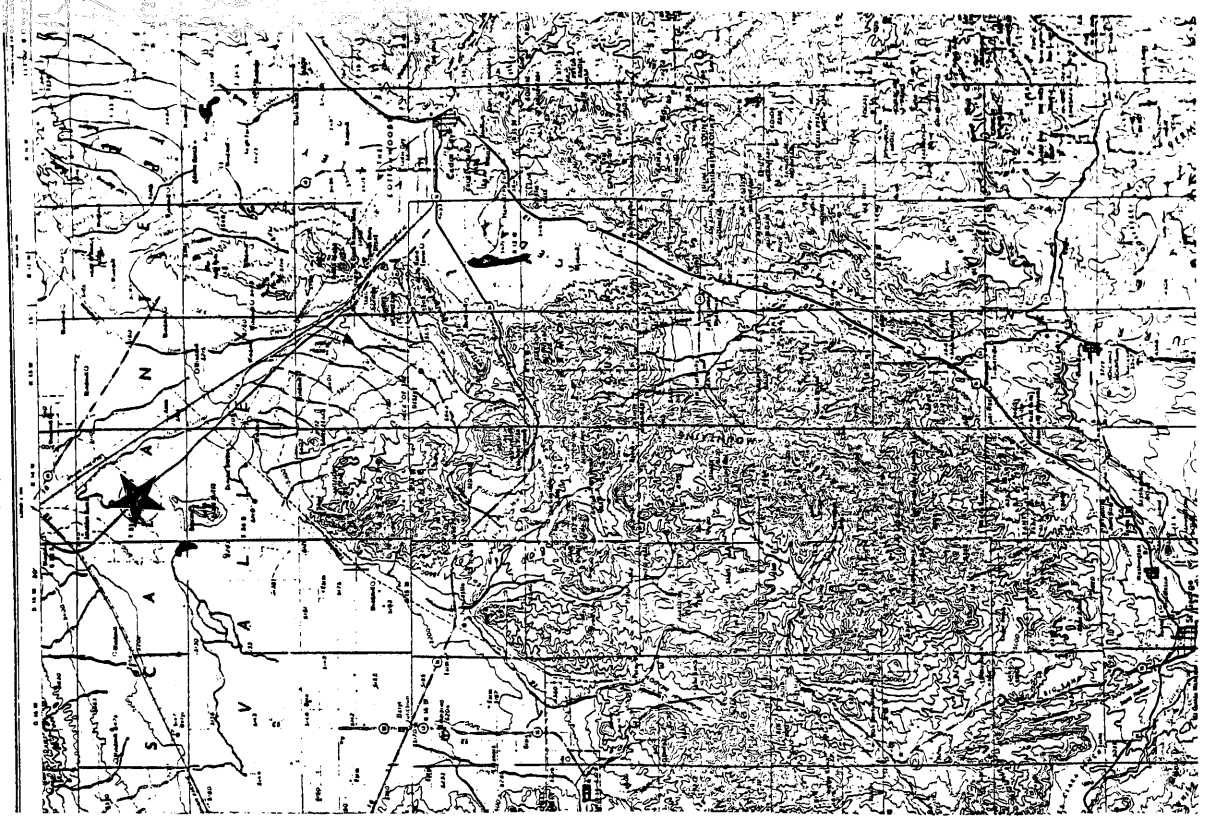
BY THE COURT:

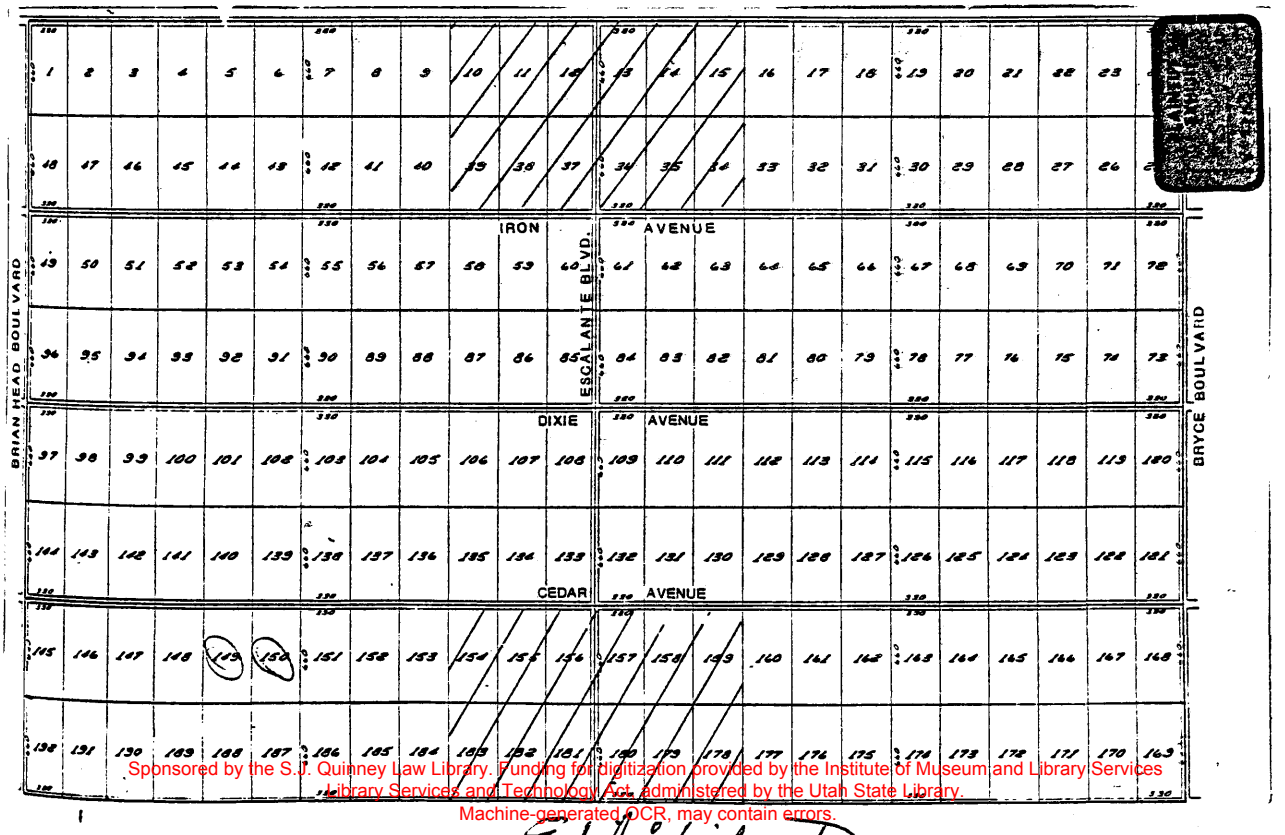
District Judge

Approved as to Form:

Wayne G. Petty
Attorney for Plaintiffs

Ronald C. Barker
Attorney for Defendants





the law in this state.

THE COURT: Well, the way Mr. Barker is smiling and the way I am frowning, one or other or both of us are going to be surprised by what the law is, because I apparently don't know it.

MR. PETTY: Well, it surprised me too. Let me tell you what I understand the law to be and cite where I get my understanding. Section 57-11-17 of the Land Sales Practices Act subsection 2 says, "In addition to any other remedies, the purchasers, under subsection (1) may recover the consideration paid for the unit together with interest at the rate of 7 percent per year . . ." and so on, ". . . and attorney's fees."

In the case of Lamb vs. Bangart there was a similar--

MR. BARKER: Do you have a citation?

MR. PETTY: Yes, excuse me. It is 525 Pac. 2d. 602.

THE COURT: Is that a Utah citation?

MR. PETTY: It is a Utah case, 1974 case.

In that case the Supreme Court referred to Section 7A-2-721. That would be in the Commercial Code.

MR. BARKER: 7A-2-721?

MR. PETTY: Yes. "Remedies for material misrepresentation or fraud include all remedies available under this chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages." It says--I think that should be, "or other remedy."

Then the opinion says, "In the instant action, in

addition to there being no provision that Paragraph 4 provided the exclusive remedy, a contract clause limiting liability will not be applied in a fraud action. The law does not permit a covenant of immunity which will protect a person against his own fraud on the ground of public policy. A contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud. Defendants claim that plaintiffs received a duplicate recovery, since they were given an award for a breach of contract concerning the warranty that the bull was a breeder without having paid the full purchase price or acquiring the full interest for which damages were awarded. Defendants claim that they were entitled to an offset for the unpaid purchase price or the Jury should have been instructed to consider this fact in assessing damages." I can read the rest but--

THE COURT: Well, I can't tell from what you are reading whether the trial court awarded judgment on two different theories in that case. True you could bring them. There is no question about alternative relief, but when we get down to some point, maybe we are not there yet, I am not sure, but sooner or later I don't think I could enter a judgment on the first cause of action and then turn right around and enter a judgment on the second cause of action.

MR. PETTY: That's the way I read Lamb vs. Bangart and there is a dissenting case, Your Honor, by Justice Ellett and Justice Ellett says you can't do both. That is specifically his dissent.

THE COURT: In the dissent he says you

MR. PETTY: That's right. He says you can't do both. The majority, there being it looks like it is a three to two decision, it is. Justice Crockett concurred in Judge Ellett's view. It was a three to two decision and the majority held that the award could be on both claims. In other words, in view--

THE COURT: You don't collect twice, do you?

MR. PETTY: That is the result in a fraud case. Under the statutory you may be awarded the judgment, under the statutory relief and you may in addition to that be awarded relief on the fraud. That's the case as I read it. I frankly was surprised.

THE COURT: What you are suggesting then is that I should award you $15,000 plus 7 percent interest plus attorney's fees on the first cause of action. And another $15,000 and 20,000 punitive on the second?

MR. PETTY: I am saying Lamb vs. Bangart stands for the proposition that can be the result.

THE COURT: Well, I will read it but I don't think that would be an equitable result even in view of if there is the worst kind of fraud.

MR. PETTY: I am not arguing the equities. I am arguing what the case stands for.

THE COURT: Well, I will read it. Could you give me either the Utah citation or let me take your copy of it?

MR. PETTY: Yes, you may take this copy, certainly. I think there may be another case attached to

THE COURT: You can argue your motion to dismiss the second cause, Mr. Barker.

MR. BARKER: Thank you. And as the Court observed the motion to require an election is still under consideration by the Court?

THE COURT: Well, there is one on file. I understand that.

MR. BARKER: May I say something further about the first cause before we leave that, Your Honor?

THE COURT: All right.

MR. BARKER: Calling attention to 57-11-2, subsection 6 which has been read before, it says, "Subdivision and subdivided lands means any land which is divided . . ." Now, the evidence is this land was not divided. There was no subdivision recorded. So that part certainly isn't so. It doesn't come within that part of the statute.

MR. PETTY: It says, "Or is proposed to be subdivided--", "proposed to be divided . . ."

MR. BARKER: "Proposed to be divided for the purpose of disposition into ten or more units . . ." Now, that doesn't say that someone misrepresented it was going to be proposed to be subdivided into ten units. It talks of an actual proposed subdividing into ten or more units.

Now, there is no evidence of that. The most that can be said for their evidence is that if it is believed there was misrepresentation as to what the intent was, a misrepresentation doesn't come within the definition of that statute. It